No. 3831

In the

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

WM. H. MOORE, JR., as Trustee in Bankruptcy of the Estate of KIMBALL & WEBB, a Partnership composed of H. J. Kimball, Jr., and Ira Webb, and H. J. KIMBALL, JR., and REX WEBB, as Individuals, Bankrupts,

Appellant,

vs.

T. E. BIGLEY,

Appellee.

Reply of Appellee to Appellant's Supplemental Brief

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Appellee.

Reply of Appellee to Appellant's Supplemental Brief

Appellee has never disputed, and does not now dispute, the elementary principles of law as set forth in the numerous decisions cited by appellant in his supplemental brief. It is, however, the contention of the appellee that under all the facts and circumstances in this matter, it satisfactorily appears that

it was the intention of all the parties to the lease that J. H. Koll was to be eliminated, and was eliminated, as a *lessee* and was not thereafter to be considered as such. It is not necessary at this time to determine whether there was necessarily or technically a novation. This court is merely determining the operation and effect of the clause in the lease under consideration permitting a termination thereof in the event of the bankruptcy of the lessees.

The Supreme Court of California in the case of Chase v. Oehlke, 30 Cal. App. Dec. 79, 80, (185 Pac. 425) discusses with lucidity the status of assignees of a lease who (as in the instant case) expressly covenant and agree to pay the rental reserved in the lease, as follows:

> "Appellants having upon sufficient consideration assumed and agreed to pay the rent, their obligation is identical with that of the original lessee upon his express covenants so to do, and when they, as alleged and found, repudiated the lease and abandoned the premises the plaintiff was entitled to stand upon the terms of the contract made with the lessee and his assigns for the lessor's benefit and sue thereon to recover the rent which they had agreed to pay, in the same manner and to the same extent *as though they had been the original obligors under the terms of the lease.*" (Italics ours.)

Again in the case of Realty and Rebuilding Company v. Rea, 184 Cal. Rep. 565, 569, the court says:

> "Where, however, the assignee expressly

> agrees in writing to be bound by the terms of the lease, there arises, as distinguished from any obligation resulting from mere occupancy, a new and different obligation which is not dependent upon occupancy of the premises, but is based upon privity of contract. By virtue of this agreement, a contractual relation is established, whereby the assignee becomes liable upon and entitled to the benefit of all of the covenants of the lease as such."

It will further be observed that in the instant case, as was stated by counsel for appellee in the oral argument of this matter, it was not necessary for Koll to obtain the permission of the lessor to the assignment of his interest in the lease, inasmuch as one lessee may assign to a co-lessee without violating provisions of assignment as such provisions ordinarily are contained in such instruments. Kimball and Webb were already bound by the terms of the lease and it was not necessary for them to accept the assignment and to assume the terms of the lease. It is therefore evident that it was the intention of all the parties that Koll should be eliminated, and that Kimball and Webb should thenceforth be the lessees and all of the lessees. It was for this reason that the respective parties signed the statements appended to the lease at that time. No other plausible motive or reason can be deduced from what they did.

Concede for the purpose of the argument that the lessor, notwithstanding the intention of the parties at the time as above mentioned, might have held Koll

to his personal obligation for the payment of the rental under the lease, nevertheless from the time of that assignment he stepped aside in favor of Kimball and Webb as the only *lessees*. Thenceforth he became and was merely a *surety* for the performance of the obligations by Kimball and Webb as *principals*. The Supreme Court of California has frequently recognized this surety relationship as existing between the assignor and the assignee of a lease, even in cases where there is a mere naked assignment:

Brosnan v. Kramer, 135 Cal. 36, 39:

> "The effect of the assignment is to make the lessee a surety to the lessor for the assignee, who, as between himself and the lessor, is the principal bound, whilst he is assignee, to pay the rent and perform the covenants. (Wood on Landlord and Tenant, sec. 350.)

Dietz v. Kucks, 45 Pac. (Cal.) 832, 833; (5 Cal. Unrep. 406):

> "In the absence of some agreement to the contrary, the tenant who, as in this instance, assigns his whole term, remains liable as a surety. The assignee becomes liable directly to the lessor upon all the covenants of the lease which run with the land, and his assignor remains his surety to the lessor for the performance of such covenants."

Cross v. Thiele, 34 Cal. App. Dec. 807, 808; (197 Pac. 974):

> "It is well settled, certainly, that where a

lease is assigned the assignor becomes a surety for the assignee under the obligation of the latter to pay the rent to the lessor."

As has also already been stated, Koll having assigned all his interest in the lease could not take possession of the lease property, notwithstanding the bankruptcy or default on the part of Kimball and Webb, and although Koll was at one time one of the lessees, in no way could he resume his position as such lessee. If the trustee in bankruptcy is permitted to sell the lease the purchaser thereof will be a party found by the trustee and not chosen or selected by the lessor. The purpose of such clause in the lease is to enable the lessor to have, in whole or in part, tenants of his own choosing.

The logic of appellant's position in this matter is in direct opposition to the intention of the parties. The reasoning of the court in the matter of Lindy-Friedman Clothing Co., Inc., Bankrupt, 275 Fed. Rep. 453 (Appellee's brief, pp. 5-10) is directly applicable to the case at bar, and is conclusive as to the issue here involved.

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